

Business Associate Liability and Other Issues

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Agenda

- Who Is a Business Associate: Continuing Questions
- How Do You Assess a Business Associate?
- Business Associate Agreement Challenges
- Cloud computing issues and BAs
- Does Offshoring Raise Concerns?
- Cyber Insurance Issues
- The Role of the Federal Trade Commission in Health Information Security

Who Is a BA?

- Increasingly complex relationships between health care providers and health plans
- Relations among health care providers: BA, workforce member, organized health care arrangement (OHCA), or none of the above?
- Maintaining PHI vs. maintaining facilities with PHI

How Do You Assess a BA?

- Risk assessing your BAs
- Values and deficiencies of 3rd party assessments
- Values and deficiencies of security questionnaires
- Prescribing security controls

How Do You Assess a BA?

- What is the BA's compliance structure?
- Dealing with “Mom and Pop” BAs
- Addressing privacy provisions that are optional under HIPAA

Business Associate Agreements

- Who is responsible for breach notification
- Reporting timelines – is sooner always better?
- Agency issues – increased control vs. increased liability
- Whether to permit de-identification

Business Associate Agreements

- Indemnification
 - Are limits on liability appropriate?
 - Should indemnification be tied to lack of reasonableness?
 - The role of cyber insurance

Cloud Computing and BAs

- Sharing security responsibilities across a cloud-based ecosystem
- Challenges when cloud provider does not know what data it is maintaining

Offshoring

- Does HIPAA place additional restrictions on contracting with non-U.S. vendors?
- Does HIPAA apply to non-U.S. vendors?
- Should considerations differ based on what foreign laws are applicable?

Cyber Insurance

- The cyber insurer – the most important party to your BAA?
- Does your cyber insurance cover your BA's acts and omissions?
- Does your BA's cyber insurance cover your liabilities

Federal Trade Commission

- Section 5 of the FTC Act – “Unfair” and “deceptive” trade practices and health information privacy and security
- Who is subject to FTC’s Section 5 authority?
- Does FTC place higher requirements than HIPAA?
- FTC and offshoring

Questions?

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